Enrichment Services Program, Inc. *and* Service Employees International Union, AFL–CIO–CLC, Petitioner. Case 10–RC–14486

May 20, 1998

DECISION ON REVIEW AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On April 15, 1994, the Regional Director for Region 10 issued an Order dismissing the petition on the ground that the Employer is exempt from the National Labor Relations Board's jurisdiction under Section 2(2) of the National Labor Relations Act as a political subdivision of the State of Georgia. In accordance with Section 102.67 of the Board's Rules and Regulations, the Petitioner filed a timely request for review of the Regional Director's Order. On September 13, 1994, the Board granted the Petitioner's request for review.

Having reviewed the record developed by the Regional Director, the Board has determined, contrary to the Regional Director, that the Employer is not exempt from its jurisdiction as a Section 2(2) political subdivision. Accordingly, we shall reinstate the petition and remand this case to the Regional Director for further proceedings consistent with this Decision.

Background

The Employer is a private, not-for-profit, tax-exempt corporation incorporated under the laws of the State of Georgia. It operates several anti-poverty programs serving eight counties in western Georgia, and is also the Head Start provider for its service area. The Petitioner seeks to represent approximately 100 regular full-time and part-time Head Start employees.

The Employer's programs, including Head Start, are funded pursuant to the Community Services Block Grant (CSBG) Act, which requires that recipient organizations be governed by a tripartite board of directors, with one-third of the directors being elected public officials or their representatives, or appointed public officials, at least one-third being ''persons chosen in accordance with democratic selection procedures adequate to assure that they are representative of the poor in the area served,'' and the remainder of the directors being ''officials or members of business, industry, labor, religious, welfare, education or other major groups and interests in the community.'' 42 U.S.C. § 9901, 9904(c)(3). The Employer's bylaws similarly provide that at least one-third of its board of directors ''shall be comprised of democratically-selected representatives of the poor. Such representatives need not be poor themselves, but will be chosen in a manner to insure that they truly represent the poor.'' The Employer has no other written guidelines for selecting these individuals.

The Employer currently has five board members selected as ''representatives of the poor'': Lillian Adkins, Samuel Nash, Martha Averett, Douglas Bryant, and Tommy Kendrick.[1] According to information provided by the Employer, Ms. Adkins is the president of the Booker T. Washington Apartments Resident Council and the unanimously elected president of the Joint Resident Councils' Presidents' Council of the Columbus (Georgia) Housing Authority, and was elected to the Employer's board by the tenants of the Housing Authority. Mr. Nash was elected to a seat on the Employer's board by the Muscogee Neighborhood Services ''Club'' at a meeting which apparently was attended by 12 individuals. With respect to Ms. Averett, the Employer produced a ballot with the heading ''Chattahoochee County—To select one person to represent the low-income on the area board'' and the names of three candidates including Ms. Averett.[2] Mr. Bryant apparently was elected to serve on the Employer's board as the representative of ''Southeast Columbus Neighborhood'' and his church. According to the Employer's summary document, Mr. Kendrick is an elected commissioner of Quitman County and was ''elected by Quitman County Neighborhood Center to represent the Center.''[3] There is no specific information in the record explaining how elections were conducted, who is eligible to vote, or how the Employer decided which groups would have the right to elect its ''representative of the poor'' directors.[4]

Contentions of the Parties

The Employer asserts that the Board has previously held that identical entities administering anti-poverty programs pursuant to CSBG Act grants are exempt political subdivisions, based on those entities being governed by tripartite boards of directors like the Employer's. See, e.g., *Woodbury County Community Action Agency*, 299 NLRB 554 (1990), and *Economic Security Corp.*, 299 NLRB 562 (1990). The Employer asserts that, because its board of directors has the same tripartite structure, it too is exempt under these precedents.

The Petitioner asserts that *Woodbury County* and *Economic Security Corp.* were wrongly decided and that the proper test for exemption as a political sub-

[1] In addition, the Employer's board has five directors who are either elected public officials or their representatives and five directors who are members or representatives of groups or interests in the community.

[2] The Employer's summary document further states that Ms. Averett was ''democratically elected by the Chattahoochee Neighborhood Service Center'' in March 1982.

[3] According to the Employer, a majority of the population of Quitman County is poor.

[4] Based on mailing addresses provided by the Employer, it appears that no more than three of the eight counties the Employer serves have a resident ''representative of the poor'' on the Employer's board.

division must include other indicia of political subdivision status such as representation from the general electorate, not just the poor; public powers such as the power of eminent domain; public access to meetings and records; and some form of public accountability. In addition, the Petitioner asserts that, even under existing law, the Employer has not established that it is an exempt political subdivision because, in prior cases, the entity found exempt had detailed election procedures providing for actual elections and other safeguards to ensure that the board members elected by ''the poor'' in fact represented those individuals. According to the Petitioner, there is no evidence that such safeguards exist in this case.

Discussion

Section 2(2) of the Act provides that the term ''employer'' shall not include ''any State or political subdivision thereof.'' The Supreme Court has held that an entity is exempt from the Board's jurisdiction as a political subdivision if it is either (1) created directly by the state, so as to constitute a department or administrative arm of the government, or (2) ''administered by individuals who are responsible to public officials or to the general electorate.'' *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971). It is undisputed in this case that the Employer was not created directly by the State of Georgia. Thus, the Employer is exempt under Hawkins County only if it is administered by officials who are responsible to public officials of the State of Georgia or to the general electorate.

As noted above, one-third of the Employer's board is comprised of ''community leaders'' from the private sector; it is undisputed that these individuals are not responsible to public officials or to the general electorate of the State of Georgia. Another one-third of the Employer's board is comprised of state public officials or their representatives. We find that these individuals are responsible to public officials or the general electorate. For an entity to be deemed ''administered by'' individuals responsible to public officials or to the general electorate, those individuals must constitute a majority of the board.[5] Thus, the issue here is whether the one-third of the board required to be ''representative of the poor'' is responsible to the general electorate.[6]

As the Employer notes, in the past, the Board has found that nonprofit corporations with tripartite boards established pursuant to CSBG Act requirements are exempt political subdivisions.[7] In both *Woodbury County* and *Economic Security Corp.*, supra, political subdivision status was based on a finding that the ''representative of the poor'' board members were responsible to the ''general electorate'' because they were elected by all low income residents within the area served by those employers.

After careful consideration, however, we find that the *Hawkins County* requirement that the employer be administered by individuals who are responsible to the general electorate is not met when the electors comprise only a limited group of voters. As the Board explained in *Concordia Electric Cooperative*, 315 NLRB 752, 754 (1994), bargining order enfd. 95 F.3d 46 (5th Cir. 1996), it

> will find an entity ''responsible to the general electorate'' only if the composition of the group of electors eligible to vote for the entity's governing body is sufficiently comparable to the electorate for general political elections in the State that the entity in question may be said to be subject to a similar type and degree of popular political control.

In *Concordia Electric*, the Board found that an electrical cooperative which provided electricity to rural consumer/members did not satisfy the requirements for exemption under Section 2(2) inasmuch as its members did not include all eligible voters residing in its geographic area and, at the same time, included corporations and other entities and individuals not eligible to vote in state elections. Id. at 754–755.

Applying these principles to the facts of this case, we find that an electorate comprised, as here, of members of various low income neighborhoods and, in *Economic Security Corp*. and *Woodbury County*, of ''all poor'' persons is not comparable to the electorate for general political elections. An ''electorate'' of all poor persons or groups thereof does not include all individuals in the area served who would be eligible to vote in general political elections. Accordingly, we find that the Employer's directors who are ''elected by the poor'' are not ''responsible . . . to the general electorate'' within the meaning of the *Hawkins County* test.

Our holding in this regard is not inconsistent with our decisions in *Salt River Project*, 231 NLRB 11 (1977), and *Electrical District No. 2*, 224 NLRB 904 (1976), as those cases are distinguishable. In both cases, the Board found that it did not have jurisdiction over special purpose districts created under state law to provide electricity to landowners in designated counties of a State. It is true that the electorate in those

[5] *Jefferson County Community Center v. NLRB*, 732 F.2d 122, 126 (10th Cir. 1984).

[6] Except for board member Kendrick, who appears to be both a ''representative of the poor'' and a public official, there is no contention or evidence that any of the ''representative of the poor'' directors are responsible to public officials.

[7] See *Lima Community Action Commission*, 304 NLRB 888 (1991); *GMN Tri County Action Committee*, 300 NLRB 963 (1990); *Albany County Opportunity*, 300 NLRB 886 (1990).

cases did not include all persons eligible to vote in general political elections, as voting rights on most matters were limited to individuals who owned specified amounts of land within the district. However, other significant factors were present. These entities, which were considered to be political subdivisions under state law,[8] were created after the filing of an election petition with the county board of supervisors, and upon an election among the taxpaying property owners within the district's geographical borders. In addition, the entities had the power to levy taxes and to condemn private and public property. The Board relied on these factors in finding that these entities were exempt political subdivisions of the state in which they were created.[9] None of these factors is present here.

There is no showing that the Employer is considered to be a political subdivision of the State of Georgia.[10] Although a state determination is not controlling, it is to be given ''careful consideration.'' See *Hawkins County*, supra at 602. Likewise, the Employer has no authority to levy taxes or to condemn public property. It was incorporated by private individuals under the State's nonprofit corporation laws, and there was no requirement for the filing of a petition with any governmental body or for the holding of an election to approve its creation. Absent any of the factors on which the Board relied to find that the employers in *Salt River Project* and *Electrical District No. 2* were political subdivisions of the state in which they were created, we find that those decisions provide no support for the Employer's contention here that it is exempt from the Board's jurisdiction.

Further, the Board in *Concordia Electric* stated that such additional factors as the employer's tax status, its regulation by Federal and state agencies, and the fact that other Federal and state authorities do not consider it to be a political subdivision ''do not support, and indeed tend to negate, the Employer's claim that it is exempt from the Board's jurisdiction.'' *Concordia Electric*, supra at 756. The Employer here concedes that its Federal tax exemption is pursuant to 26 U.S.C. § 501(c)(3), which applies to nonprofit charitable entities. This exemption requires no proof of political subdivision status, but turns instead on the Employer's nonprofit status.[11] Of course, the Board routinely exercises jurisdiction over other nonprofit entities, including hospitals and colleges, which are, like the Employer, exempt from Federal taxes pursuant to § 501(c)(3). We find that the Employer's tax exemption under these circumstances does not support a finding of political subdivision status. *Concordia Electric*, supra.

Congress recognized in the CSBG Act that community action services could be provided by political subdivisions or by private entities such as the Employer. See 42 U.S.C. § 9902.[12] Here, the State of Georgia provides various community anti-poverty services, including Head Start, to the eight-county area involved in the instant case by private means rather than by the state itself. There is no evidence that the State of Georgia considers the Employer a political subdivision.

Conclusion

For the foregoing reasons, we find that individuals are responsible to the general electorate under Hawkins County only if the relevant electorate is the same as that for general political elections.[13] Because the Employer's ''representative of the poor'' directors do not satisfy this requirement, we find that they are not ''responsible . . . to the general electorate.'' Accordingly, inasmuch as less than a majority of the Employer's board is comprised of public officials or individuals responsible to the general electorate under Hawkins

[8] The constitution of the State of Arizona specifically provides that electrical districts are ''political subdivisions'' of the State. *Electrical District No. 2*, supra at 905. Further, the Supreme Court has referred to the Salt River Project as a ''local governmental body.'' *Ball v. James*, 451 U.S. 355, 357 (1981).

[9] See also *Oxnard Harbor District*, 34 NLRB 1285 (1941) (exempt employer was established by petition filed with county board of supervisors, which had authority under state law to levy taxes for benefit of district). In *Lewiston Orchards Irrigation District*, 186 NLRB 827 (1970), enf. denied 469 F.2d 698 (9th Cir. 1972) (per curiam), the Board found that an irrigation district established by a petition filed with the county board of supervisors, which was considered a municipal or public corporation under state law, was not a political subdivision because its electorate was limited to landowners. The Ninth Circuit declined to enforce the Board's assertion of jurisdiction, however, and the Board subsequently recognized in *Electrical District No. 2*, supra at 906, that a limitation of voting eligibility to landowners was not sufficient to justify a finding that the employer was not a political subdivision in light of the other circumstances, discussed above, present in that case.

[10] To the contrary, community action agencies like the Employer have consistently been found to be private entities. See *Hines v. Cenla Community Action Commission*, 474 F.2d 1052 (5th Cir. 1973) (community action agency not state actor for purposes of Federal civil rights suit); *Longoria v. Cearley*, 796 F. Supp. 997 (W.D. Tex.1992) (community action agency not exempt from ERISA as state political subdivision).

[11] By contrast, there is no evidence that the Employer has ever sought, or obtained, Federal tax exemption pursuant to 26 U.S.C. § 115, which does require a determination of political subdivision status. Accordingly, we need not pass on the effect, if any, that an exemption on that basis would have on the question of an entity's political subdivision status under Sec. 2(2).

[12] Sec. 9902 provides, in pertinent part:

> In any geographic area of a State not presently served by an eligible entity, the Governor of the State may decide to serve such a new area by . . . designating any . . . organization which has a board meeting the requirements of section 675(c)(3) [i.e. at least one-third of the directors are ''representative of the poor''] or any political subdivision of the State . . . .

[13] Accordingly, *Woodbury County, Economic Security Corp.*, and all subsequent cases finding CSBG Act anti-poverty service providers like the Employer to be exempt political subdivisions, where the ''representative of the poor'' members of the tripartite board were elected by limited groups of voters, are overruled.

County, the Employer is not an exempt political subdivision.

ORDER

It is ordered that the petition filed in Case 10–RC–14486 be reinstated, and this proceeding is remanded to the Regional Director for Region 10 for further proceedings consistent with this decision.

CHAIRMAN GOULD and MEMBER FOX, concurring.

We agree with Members Liebman and Brame that the Employer is not exempt from the Board's assertion of jurisdiction as a political subdivision, and with the overruling of *Woodbury County Community Action Agency*, 299 NLRB 554 (1990); *Economic Security Corp.*, 299 NLRB 562 (1990), and subsequent related cases. Unlike our colleagues, however, we would also overrule *Salt River Project*, 231 NLRB 11 (1977), and *Electrical District No. 2*, 224 NLRB 904 (1976), cases which they find are distinguishable from the present case.

The Board holds today, and we agree, that an entity is not exempt under Section 2(2) of the Act as a political subdivision, under the Board's test as set forth in *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600, 604–605 (1971), unless the electorate to which an entity's administrators are responsible reflects all individuals in the area served who are eligible to vote in general elections. Thus, this requirement is not met when the electors comprise only a limited group of voters.

Salt River Project and *Electrical District No. 2* involved electorates comprised of a limited group of voters, and are therefore inconsistent with this holding. Although our colleagues acknowledge that the entities at issue in those cases were not ''responsible to the general electorate'' because voting rights were limited to persons owning specified amounts of land within the districts, they cite various other factors present in those cases as establishing that the entities were nevertheless political subdivisions. Under the *Hawkins County* test, however, the Board has expressly limited the exemption for political subdivisions to entities that meet either the first or the second prong of the test,[1] regardless of what other factors may be present. Thus, consistent application of the *Hawkins County* test requires that *Salt River Project* and *Electrical District No. 2* be overruled.

[1] As Chairman Gould set forth in his dissent in *Oklahoma Zoological Trust*, 325 NLRB No. 17 (Nov. 8, 1997), in his view a critical factor in establishing whether an entity's administrators are accountable to the general electorate or the public officials who appointed them is whether the general electorate or the public officials have an unfettered right of removal during the administrator's term. Id. slip op. at 4.

In addition, the Supreme Court's decision in *Ball v. James*, 451 U.S. 355 (1981), relied on by the plurality, does not require a different result. Although in that case the Court referred to the Salt River District as a ''local governmental body,'' the issue of whether Salt River District was a political subdivision was not before the Court. In fact, the Court noted that its review ''of the history, organization, functions and financing of the [Salt River] District [was] drawn from the stipulation of facts in the District Court.'' Id. at 357. Because this issue was never considered by the Court, its reference to the Salt River District as a ''local governmental body'' carries no precedential value.

Accordingly, although we concur in the assertion of jurisdiction over the Employer, Enrichment Services Program, Inc., we would overrule *Salt River Project* and *Electrical District No. 2* in doing so.

MEMBER HURTGEN, concurring.

I do not believe that an entity is private simply because its directors are elected by only a segment of the citizenry. Thus, if directors are elected by property owners, or by persons living in certain ''poor'' neighborhoods, that is consistent with public control.[1]

On the other hand, there are other factors in this case which affirmatively establish that the Employer is private rather than public. The IRS regards it as a nonprofit charitable entity under 26 U.S.C., § 501 (c)(3), rather than as a political subdivision under 26 U.S.C. § 115. In addition, the Employer has no authority to levy taxes or to condemn property. Further, it was created by private individuals who filed a petition under Georgia's nonprofit corporation laws. Moreover, under the Community Services Block Grant Act, community services can be provided by political subdivisions *or* by private entities. It would appear from the above that Georgia has followed the latter course. Certainly, there is no evidence that Georgia regards the Employer as a public entity. Finally, I note that similar agencies have been held to be private entities.[2]

Based on the circumstances set forth above (and not on the fact that the eligible voters are confined to the poor), I conclude that the Employer is a private entity.

[1] In the following cases, entities were held to be political subdivisions, notwithstanding the fact that only property owners were eligible to vote for the directors of the entity. *Salt-River Project*, 231 NLRB 11 (1977); *Electrical District No. 2*, 224 NLRB 904 (1976); *NLRB v. Lewiston Orchards*, 469 F.2d 698 (9th Cir. 1972). Consistent with these cases, the Board has held that other entities were also political subdivisions, notwithstanding the fact that only poor persons were eligible to vote for certain directors of the entity. See *Economic Security Corp.*, 299 NLRB 562 (1990); *Woodbury County Community Action Agency*, 299 NLRB 554 (1990).

[2] See fn. 10 of plurality opinion.